IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0354

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DANNY SARTAIN,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighteenth Judicial District Court, Gallatin County,
The Honorable Mike Salvagni, Presiding

APPEARANCES:

STEVE BULLOCK
Montana Attorney General
MICHEAL S. WELLENSTEIN
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

MARTY LAMBERT
Gallatin County Attorney
SCOTT LANZON
Deputy County Attorney
1709 West College
Bozeman, MT 59715

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

NANCY G. SCHWARTZ
NG Schwartz Law, PLLC
U.S. Bank Building
303 North Broadway, Ste. 600
Billings, MT 59101

ATTORNEY FOR DEFENDANT
AND APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 1

SUMMARY OF THE ARGUMENT 8

ARGUMENT 10

I. THE DISTRICT COURT CORRECTLY DENIED SARTAIN'S MOTION TO DISMISS FOR LACK OF SPEEDY TRIAL 10

A. Facts Relating to the Speedy Trial Claim 10

B. Standard of Review 19

C. The Four Speedy Trial Factors 19

1. The Length of the Delay 20

2. Reasons for the Delay 20

3. The Accused's Response to the Delay 21

4. Prejudice to the Accused 25

a. Oppressive pretrial incarceration 26

b. The accused's anxiety and conern 27

c. Impairment of the defense 28

5. The District Court Correctly Balanced the Four Speedy Trial Factors 30

TABLE OF CONTENTS (Cont.)

II. LEGAL STANDARDS FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM 30

III. SARTAIN'S INEFFECTIVE ASSISTANCE CLAIMS SHOULD BE REVIEWED IN A POSTCONVICTION PROCEEDING 32

IV. ASSUMING THIS COURT CHOOSES TO ADDRESS THE CLAIMS, SARTAIN HAS NOT DEMONSTRATED MOORE PROVIDED INEFFECTIVE ASSISTANCE 33

A. The Show-up Identification 33

B. Challenging Sartain's Warrantless Arrest and Suppresson of Sartain's Statements After His Arrest 35

C. Objecting to Prosecutor's Questions, Remarks and Closing Argument 37

CONCLUSION 40

CERTIFICATE OF SERVICE 41

CERTIFICATE OF COMPLIANCE 41

TABLE OF AUTHORITIES

CASES

Clausell v. State,
2005 MT 33, 326 Mont. 63, 106 P.3d 1175 38

Coleman, Thompson,
501 U.S. 722 (1991) 25

Kills On Top v. State,
273 Mont. 32, 901 P.2d 1368 (1995) 38

State v. Ariegwe,
2007 MT 204, 338 Mont. 442, 167 P.3d 815 ..... passim

State v. Billman,
2008 MT 326, 346 Mont. 118, 194 P.3d 58 ..... 25, 28

State v. Bowser,
2005 MT 279, 329 Mont. 218, 123 P.3d 230 26

State v. Gladue,
1999 MT 1, 293 Mont. 1, 972 P.2d 827 40

State v. Hagan,
2002 MT 190, 311 Mont. 117, 53 P.3d 885 31

State v. Olsen,
2004 MT 158, 322 Mont. 1, 92 P.3d 1204 38

State v. Robinson,
2009 MT 170, 350 Mont. 493, 208 P.3d 851 ..... 31, 32

State v. Rose,
2009 MT 4, 348 Mont. 291, ___ P.3d ___ 16, 21, 22

State v. Rovin,
200 MT 16, 349 Mont. 57, 201 P.3d 780 32

TABLE OF AUTHORITIES (Cont.)

State v. Vukasin,
2003 MT 230, 317 Mont. 204, 75 P.3d 1284 ..... 32, 38

State v. Williamson,
1998 MT 199, 290 Mont. 321, 965 P.2d 231 36

Strickland v. Washington,
466 U.S. 668 (1984) 30, 31

Vermont v. Brillon,
129 S. Ct. 1283 (2009) 25

Whitlow v. State,
2008 MT 140, 343 Mont. 90, 183 P.3d 861 ..... 30, 31

OTHER AUTHORITIES

Montana Code Annotated
§ 46-6-311(1) 35

Montana Rules of Evidence
Rule 12(1)(f) 39

STATEMENT OF THE ISSUES

1. Did the district court properly deny Sartain's motion to dismiss for lack of a speedy trial?

2. Should this Court decide Sartain's ineffective assistance of counsel claims on direct appeal based on a silent record?

3. If this Court chooses to address Sartain's ineffective assistance claims, has Sartain met his burden of proving both deficient performance and prejudice?

STATEMENT OF THE CASE

A jury found Danny Sartain guilty of burglary after a two-day trial. (D.C. Doc. 64.) The district court sentenced Sartain to 40 years in Montana State Prison as a persistent felony offender. (4/13/09 Tr. at 44, 58; D.C. Doc. 69.) The district court ordered the sentence to run concurrently with Sartain's Flathead County sentences. (4/13/09 Tr. at 58; D.C. Doc. 69.)

STATEMENT OF THE FACTS

Timothy Hop lives in an apartment at 117 East Aspen Street, in Bozeman. (3/17/09 Tr. at 81-83; State's Ex. 1.) On March 25, 2008, after skiing in the morning, Hop returned to his apartment. The front door was slightly ajar. (3/17/09 Tr. at 84-87.) As Hop reached to open the door, someone closed and locked the

door from the inside. (Tr. at 87, 123.) Hop opened the door with his key and, upon entering the apartment, he saw a man. The man was white, medium height, stocky, and wearing a long sleeve light colored shirt and a light-colored baseball cap. (3/17/09 Tr. at 87-88, 124.) Hop made eye contact with the man and got a good look at him before the man fled out the back door. (3/17/09 Tr. at 88-89, 117-18.) At trial, Hop identified Sartain as the man he saw in his apartment. (3/17/09 Tr. at 89, 147.) One of the keys to Hop identifying Sartain in court was Sartain's eyes. (3/17/09 Tr. at 88-89, 112.)

After Sartain fled, Hop grabbed his pistol and chased after Sartain. (3/17/09 Tr. at 89-90, 125.) Hop yelled, and when Sartain got to the backyard fence, he stopped and turned towards Hop. Hop thought he saw something in Sartain's left hand. Hop fired a shot past Sartain to put him on the defensive and make him retreat. (3/17/09 Tr. at 92-93, 126-27.) Sartain ran through the gate on the east side of the yard, and south out of Hop's sight. Hop ran through his apartment and out the front door to look for Sartain but did not see him. Hop dialed 911. (3/17/09 Tr. at 94-95, 133-34.)

Kristi Helsper lives in the same building as Hop. (3/17/09 Tr. at 152-54, 158; State's Ex. 1.) On March 25, 2008, at approximately 1:30 p.m., Helpser heard a loud noise. Helsper looked out her front window and saw a man running south on the sidewalk along North Bozeman Avenue. (3/17/09 Tr. at 154-57, 162.) She

described the man as little bit stocky, and wearing jeans and a white elbow length t-shirt. Helsper did not see his face. She believed he had a hat on. (3/17/09 Tr. at 157-58, 161, 163-64, 170.)

Adrian Inabnit lives at 711 North Bozeman Avenue, which is approximately a 1/2 block south of Hop's and Helsper's apartments. (3/17/09 Tr. at 172-73; State's Ex 1.) On March 25, 2008, Inabnit was sitting at his kitchen table when he thought he heard a gunshot. Shortly thereafter, Inabnit noticed a man walking purposefully through his back yard. Inabnit saw something dark in the man's hand. (3/17/09 Tr. at 176-77.) Inabnit described the man as husky, weighing around 200 pounds plus, approximately six feet tall and age 35 to 50. The man had a bare-headed crew cut style hair cut, and he was wearing a grey or khaki pullover sweat shirt. (3/17/09 Tr. at 177-79, 182-83.) Inabnit did not see the man's face. Inabnit watched the man go through his back yard into the alley between North Bozeman Avenue and North Black Avenue, and proceed south. (3/17/09 Tr. at 179-80; State's Ex. 1.)

Jason Schutz lives at 722 North Black Avenue. His entire property is fenced. (3/18/09 Tr. at 119-20, 126.) Schutz's house is approximately a 1/4 block west and a 1/4 block south of Hop's apartment. His house also abuts the same alley as Inabit's house, but Schutz's house is on the west side of the alley. (State's Ex. 1.) On March 25, 2008, Schutz had returned home for lunch and was working on

his computer when he heard his dog violently barking in his yard. Schutz stuck his head out his back door and saw a man going over his south fence. Schutz described the man as "kind of bigger, six feet plus" with either real short hair or balding, and he thought the man might have been wearing a white t-shirt. (3/18/09 Tr. at 119-22, 126; State's Ex.1.)

When Schutz asked the man what he was doing, he replied that Schutz's dog was chasing him. When Schutz responded that he had been in his yard, the man asked Schutz if he was Jeremy because he was supposed to meet Jeremy for a job interview. (3/18/09 Tr. at 123.) Schutz identified Sartain as the man he had talked to and watched jumped his fence. (3/18/09 Tr. at 125.) Schutz did not believe Sartain's story. Sartain left Schutz's yard heading south. Schutz felt something was wrong, so he went out his front door and watched Sartain walk rapidly down the street. (3/18/09 Tr. at 124-27.)

Bozeman Police Officer Cory Klumb received a radio dispatch of a male intruder in an Aspen Street house. The dispatcher stated that the intruder had left the house and described him as white, six feet tall, 180 to 200 pounds, wearing a light colored shirt and light colored ball cap. (3/17/09 Tr. at 185-86, 212-13.)

Klumb drove north through the alley on the west side of Hop's apartment, and then proceeded south on North Black Avenue. As he approached the intersection of North Black and East Aspen he saw a man matching the description

of the suspect jogging south down the sidewalk. (3/17/09 Tr. at 186-89, 191.) Klumb also saw Schutz standing on the sidewalk in front of his house. Klumb pulled his car over and asked Schutz what he was looking at down the sidewalk. Schutz told Klumb that the man running down the sidewalk had just jumped the fence in his yard, and had cut through his neighbor's lawn. (3/17/09 Tr. at 188-89; 3/18/09 Tr. at 127.)

Klumb radioed his fellow officers that he had spotted the suspect heading south on North Black Avenue. (3/17/09 Tr. at 189.) He then drove down the street, pulled alongside of the suspect, slid to a stop, exited his car with his weapon drawn, and told the man to drop what he had in his hand. The suspect had a cell phone, and Klumb overheard him say that the cops are here. The suspect, identified as Sartain, folded up his cell phone, placed it in a hip holster, got on his knees and raised his hands. Sartain was wearing sunglasses, a white three button T-shirt, and jeans. (Tr. at 190, 194-95; State's Ex. 16.) Klumb handcuffed Sartain and searched for weapons. Klumb noticed that Sartain was breathing hard as if he had been running. He could actually feel Sartain's heart beating when he felt around Sartain's chest. When Sartain asked "what this is about," Klumb told him he was being detained on suspicion of burglary, and Sartain replied "Oh." (3/17/09 Tr. at 192-93.) Klumb then took Sartain into custody and put him in his patrol car. (3/17/09 Tr. at 195.)

Klumb took Sartain into custody approximately a block and a half south of Hop's apartment. (3/17/09 Tr. at 215; State's Ex. 1.) Klumb testified that Sartain became a suspect when he saw Sartain running down the sidewalk and because Sartain matched the general description of the intruder. (3/17/09 Tr. at 223-24.) Klumb stated boots, jeans and a long sleeve t-shirt are not normal jogging attire. (3/17/09 Tr. at 227.)

After putting Sartain in his patrol car, Klumb talked to Schutz. Schutz told Klumb about his dog barking, and seeing Sartain jump his fence and run off. (3/17/09 Tr. at 195.) Where Schutz said Sartain had jumped the fence Klumb saw footprints in the mud and on the other side of the fence he saw the same footprints in the snow. Investigators photographed the footprints. (3/17/09 Tr. at 196, 204-05; State's Exs. 17-19, 24.) Sartain was wearing size 10 work boots. Sartain's boots were worn and the soles were muddy. Investigators also photographed Sartain's boots. (3/17/09 Tr. at 196-97, 201-02; State's Exs. 16, 20-23, 25.) Klumb testified the photographed footprints along Schutz's fence had similar tread marks to the tread marks on Sartain's boots. (3/17/09 Tr. at 205.)

Hop testified there were fresh footprints in the snow in his back yard that were not his. Hop was wearing cross country ski boots. When Hop went outside after Sartain, he did not go through the snow. As he followed Sartain, Hop noticed the fresh snowy footprints. (3/17/09 Tr. at 101-02, 106-07.) Bozeman Police Detective

Andy Knight took part in the investigation. Knight testified that the snowy footprints in Hop's yard and the footprints in the mud by Schutz's fence were consistent as far as size and tread pattern. (3/17/09 Tr. at 234-35; 3/18/09 Tr. at 16.) Knight further testified Sartain had parked his car on Aspen Street, only 60 feet away from Hop's apartment. (3/17/09 Tr. at 239.)

After talking to Schutz, Klumb drove Sartain back to the scene. A detective asked Klumb to have Sartain step out of the patrol car to see if Hop and Helsper could indentify Sartain. (3/17/09 Tr. at 111, 207-09.) Hop told the officers that what Sartain was wearing, his size and shape all looked right but he could not positively identify Sartain as the man he had earlier seen in his apartment because Sartain was now wearing sun glasses shading his eyes, and he was not wearing a baseball cap. (3/17/09 Tr. at 112-13, 122, 134-35, 150.)

Helsper told the officers that Sartain matched the description of the person she saw earlier. Sartain had the same build, shirt and jeans as the person she had seen. Helsper was not able to positively identify Sartain as the man she earlier saw running down the street because she never saw the man's face. (3/17/09 Tr. at 159-60, 167-68.)

After Sartain had fled, Hop noticed fresh jimmy marks on the back and front doors to his apartment. (3/17/09 Tr. at 95-99, 108-10; State's Exs. 2, 3, 9-12.) The edge of the door was bent up "as if it had some prying going on with the burglary

tool." (3/17/09 Tr. at 96-97.) A "dog track" conducted by a police dog resulted in the discovery of a pry bar in the alley between North Bozeman Avenue and North Black Avenue. (3/18/09 Tr. at 16-19, 33-38, 56-63; State's Exs. 28, 29.) The pry bar was found approximately one block south of Hop's apartment. (3/18/09 Tr. at 84-85; State's Ex. 1.) The officers also found a footprint in the mud near the pry bar. (3/18/09 Tr. at 35-36; 60-63, 85, 108, 110; State's Exs. 31, 33.)

Detective Knight testified the pry marks on Hop's doorjambs are similar to marks on the pry bar found in the alley. (3/18/09 Tr. at 37-39.) Knight also testified the footprints found in snow in the back yard at 117 East Aspen (Hop's apartment), and the footprints at Schutz's house, are similar as far as size and tread pattern to the footprints found near the pry bar. Additionally, Knight testified Sartain's shoes had a very similar tread pattern and size to those found in the alley, in Hop's backyard and in Schutz's yard. (3/18/09 Tr. at 39-40.)

SUMMARY OF THE ARGUMENT

The speedy trial factors demonstrate that Sartain was not denied a speedy trial. The vast majority of the delay attributable to the State was institutional delay. Sartain can hardly claim he was denied a speedy trial due to the delay when the district court specifically set the trial for March 17, 2009, so Sartain could call all of the witnesses he wanted to testify. The district court correctly recognized that

Sartain acquiesced to the March 17, 2009 trial date at the August 11, 2008 omnibus hearing, and that Sartain then waited four months to voice his objection to the agreed upon trial date. The State diligently attempted to bring Sartain's case to trial. At the omnibus hearing, the prosecutor expressed concerns about a possible speedy trial problem. It was only after Sartain's counsel, Casey Moore, stated he wanted the three-day March trial setting in order to call Sartain's witnesses that the prosecutor assented to the March trial date. Moreover, the delay did not prejudice Sartain. Notably, Sartain's ability to present an effective defense was not impaired by the delay.

Although the record is silent record as to why Moore did not challenge the show-up identifications and the legality of Sartain's arrest, move for the suppression of Sartain's statements, or object to the prosecutor's remarks, questions and argument, Sartain now asks this Court on direct appeal to address his ineffective assistance claims. The silent record here cannot rebut the strong presumption that Moore's conduct falls within the wide range of reasonable professional assistance. Sartain should pursue his ineffective assistance claims in a postconviction proceeding. Such a proceeding will provide Moore with the opportunity to explain his actions or inactions and the necessary record to evaluate whether his tactics fall within the wide range of reasonable professional conduct. If this Court chooses to

address Sartain's claims, Sartain has not demonstrated Moore provided ineffective assistance under the Strickland test.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED SARTAIN'S MOTION TO DISMISS FOR LACK OF SPEEDY TRIAL.

A. Facts Relating to the Speedy Trial Claim

On March 25, 2008, Sartain was arrested and charged with Burlgary. (Notice to Appear and Compl., attached to D.C. Doc. 4.) On March 26, 2008, Sartain made his initial appearance in justice court and bail was set at $10,000. (Justice Ct. Docs. attached to D.C. Doc. 4.) On April 1, 2008, Sartain posted bail and was released from the Gallatin County Detention Center. (D.C. Docs. 4, 5.) Sartain went to Butte, where he called his parole officer and told him that he was out of jail. (2/24/09 Tr. at 5-6.) At the time of his arrest, Sartain was on parole for a burglary in Flathead County. (2/24/09 Tr. at 25-26.) Sartain's parole officer placed him in the Silver Bow County Jail. (2/24/09 Tr. at 6-7.) Because Sartain was on parole, he was later transported to Montana State Prison. (2/24/07 Tr. at 7.) Sartain's parole was revoked as result of the charge filed in this case. (2/24/08 Tr. at 21-22.)

On April 14, 2008, the State charged Sartain by Information in district court with Burglary. (D.C. Doc. 3.) On the same day, the district court issued a Summons

for Sartain's initial appearance in district court on May 5, 2008. (D.C. Doc. 6.) Sartain did not appear. (D.C. Doc. 9.) At the request of Sartain's counsel, the district court ordered that Sartain be transported from Butte to Gallatin County for his initial appearance. (D.C. Doc. 10.) The district court later amended its transportation order since Sartain had been taken to the prison for his parole violation. (D.C. Doc. 17.) On July 7, 2008, Sartain made his initial appearance in the district court, and plead not guilty. The district court set Sartain's bail at $20,000, and scheduled the omnibus hearing for August 11, 2008. (D.C. Doc.19.) The district court ordered the Gallatin County Sheriff's Office to transport Sartain back to the prison. (D.C. Doc. 21.)

At the August 11, 2008 omnibus hearing, the parties discussed setting a trial date. Sartain's counsel, Casey Moore, informed the district court that the trial would take three days or less, and that Sartain was incarcerated at the prison. (Ex. A. at 21, attached to D.C. Doc. 52.) When the district court asked if there was a speedy trial issue, the prosecutor stated Sartain was in custody because of the revocation of his parole and there was a possibility of a speedy trial issue. Id. at 21-22.

The prosecutor informed the district court that the case was a one-day trial case. Id. at 22. The court stated it could schedule the trial on November 3, 2008, or in March 2009. Regarding the November date, the court stated the trial could start on November 3 and spill over to November 5. Moore expressed that there was not a speedy trial issue because Sartain was in custody and his parole had been

revoked. After the court and the prosecutor mentioned the issue of prejudice to Sartain, Moore thought the court should choose the November trial date and "do what we can." Id. at 22-23.

The prosecutor asked the court if there was any chance to schedule an earlier trial date. Moore stated the problem he faced was that Sartain would not be happy if Moore did not subpoena and call all of the witnesses Sartain wanted to testify. Id. at 23-24. The prosecutor responded that if the additional time would benefit Sartain, and that fact is set forth in the record, the March trial date was acceptable. Moore replied that "we could do that." Id. at 24.

The district court indicated that he could set the trial the next month (September). The prosecutor agreed with the September trial date, but Moore announced the September trial date would not work for him because he was not available from September 2 to September 25, due to National Guard duty. Id. at 24-25. Moore further stated, if the trial has to be set in March, "there can't be prejudice if it's the Court's calendar, right?" Id. at 25. The following discussion then took place regarding benefits of a later trial date for Sartain:

> MR. WHIPPLE: Yeah, it can. It's an institutional delay. But what I'm saying is if it benefits your client to have additional witnesses come in, then we can do that. Do you want to just--you can either agree to that statement or not. I think whatever you want to do.
>
> MR. MOORE: Let's see what he says.
>
> THE COURT: What did you decide?

> MR. WHIPPLE: Your Honor, after discussing it with Mr. Moore it appears that it might benefit the Defendant to have an additional time to call witnesses and to have the full three days to try the case. If that is the case, then the State does not have any objection of it being set in March. He's not--he is in a custodial sentence at the prison, so--
>
> MR. MOORE: Right. So the State's representing to the Court that they think they can make their case with one or two witnesses and I'm saying that I would subpoena all parties involved, but that would take longer than a day. And so that being the case, I would request the three-day setting.

Id. at 25-26. The district court granted Moore's request and set the trial for March 17, 2009. Id. at 26.

On January 8, 2009, Sartain filed a motion to dismiss for lack of a speedy trial. (D.C. Doc. 25.) On February 24, 2009, the district court conducted a hearing. The court took judicial notice of the omnibus hearing transcript. (2/24/09 Tr. at 43-44.) Moore acknowledged that at the omnibus hearing the court had considered setting the trial in September, but he was unavailable. (2/24/09 Tr. at 45, 50.) Moore also acknowledged the court's calendar precluded an October trial date, and it had offered to set the trial on November 3 and 5, but he told the court he needed three days because of the number of defense witnesses, so the court set the trial for March 17, 2009. (2/24/09 Tr. at 45, 48-50, 61.) Moore admitted he had not objected to the March 17 trial date. Id.

On March 9, 2009, the district court issued findings of fact, conclusions of law and an order denying Sartain's speedy trial claim. (D.C. Doc. 52.) The court

found a total delay of 357 days. Id. at 12-13. The court attributed the 103 days of delay from the date of Sartain's arrest until his July 7, 2008 initial appearance, to the State[1]. The court recognized there was some confusion regarding Sartain's location because he was placed in the custody of his parole officer after his release on bail. Id. at 14. The court further stated:

> There is no evidence to suggest that this delay was done in bad-faith by the State to gain any tactical advantage or to avoid trial on the part of the State. If anything, the delay was caused by the lack of diligence on the part of the State in bringing the Defendant before the Court for an initial appearance.

Id.

The court found the 35 days of delay from the initial appearance until the August 11, 2008 omnibus hearing, was institutional delay because it was inherent in the criminal justice system and not under the State's or Sartain's control. The court held the State responsible for the 35 days of institutional delay but weighed it less heavily against the State. Id. at 14-15.

The court noted there were 218 days of delay from the August 11, 2008 Omnibus Hearing, until the March 17, 2009 trial date. The court found that Sartain's counsel was unavailable for trial from September 2 to 25, 2008, and as a result it attributed 24 days to Sartain. The court found the rest of the delay during

[1] The court did not include the 24 hours Sartain was released on bail. (D.C. Doc. 52 at 14-15.)

this period (194 days) was institutional, attributable to the State, but that it should weigh less heavily against the State. Id. at 15.

In summary, the district court found that 103 days of delay were attributable to the State due to lack of diligence, and 218 days[2] were attributable to the State as institutional delay, for a total of 332 days. Id. The court further found: "The remaining 25 days are attributable to Defendant for the one day that he was released from custody and his counsel's unavailability for trial in September." Id.

Regarding Sartain's responses to the delay, the court noted there was a discussion at the omnibus hearing concerning an appropriate trial date, "keeping in mind [Sartain's] right to a speedy trial." Id. at 15. The court explained it had suggested a September 2008 trial date, but defense counsel was unavailable for a September trial. The court noted there were no trial dates for October, and when it offered November 3 and November 5 trial dates, Moore initially agreed to those dates, but then expressed concern about those dates because he might not have sufficient time to call all the witnesses that Sartain wanted to testify. Id. at 16. The court emphasized that "[t]he prosecutor stated numerous times that the State was willing to proceed at the earliest trial date, and that it required minimal time regarding voir dire, opening statements, and witness examination." Id.

[2] The district court miscalculated the total amount of institutional delay. Instead of 218 days of institutional delay, the total amount of institutional delay here was 229 days.

The district court explained that Moore had requested a March 2009 trial date after it had advised Moore three days for trial were available in March. Id. at 16-17. The court emphasized Sartain had wanted the March trial date:

> At the Omnibus Hearing Defendant was represented by counsel. Defendant wanted three days for the trial. Defendant did not object to the trial being scheduled for March 17, 2009. Defendant acquiesced in that trial setting. Defendant did not insist on having a trial earlier than March 17, 2009. Even after the Court offered to commence the trial on November 3 and to continue on November 5, Defendant expressed a preference for more time. After the Omnibus Hearing on August 11, 2008, and after the Defendant personally became aware of the trial date in September, 2008, Defendant made no objection until he filed his Motion to Dismiss on January 8, 2009, which was four months after the Court set the trial date. In making this observation, the Court is aware of the Supreme Court's rule that "any delay directly attributable to the filing of such a motion *thirty or more* days prior to the scheduled trial date should be charged to the State (as institutional delay). Ariegwe, ¶ 16. The Court has not attributed the delay in making the motion five months after the Omnibus Hearing and the Defendant's acquiescence in the March 17, 2009, trial date to Defendant, but merely makes this observation to illustrate the Defendant's lack of persistence and sincerity in objecting to the trial date.

Id. at 17-18.

In contrast, the court recognized the State wanted an earlier trial date, stating:

> [T]he State was diligent in bringing this case to trial. State v. Rose, 2009 MT 4, ¶ 62, 348 Mont. 291, __ P.3d ___ ("The State's response to the motions for delay indicates its desire to proceed to trial.") The State expressed its concern about the speedy trial issue. It was only after Defendant's counsel desired additional time that the prosecutor did not object to the March trial date. Court's Exhibit A at 25.

Id. at 18.

The court carefully analyzed whether the delay prejudiced Sartain. Id. at 18-23. In finding Sartain's pretrial incarceration was not oppressive, the court observed in part that Sartain has previously spent eight years in Montana State Prison and that he had been convicted of five burglaries. The court concluded Sartain's "incarceration has not been duly oppressive particularly in light of the Defendant's criminal history and the fact that he previously spent considerable time in prison." Id. at 20. The court added that Sartain had testified he suffered from many of the same ailments about which he now complains before being incarcerated at the prison. Id.

The court acknowledged Sartain had suffered anxiety and concern due to his incarceration as well as economic hardship from not being able to work. However, it found that "in light of [Sartain's] acquiescence in the March trial setting, the Court does not conclude [Sartain's] anxiety and concern were aggravated by the delay." Id. at 21.

The court found there is no evidence that Sartain's "ability to present an effective defense has been impaired by the delay." Id. at 23. In fact, Sartain had wanted the three-day trial setting so he could have sufficient time to call his witnesses. The court found Sartain had not asserted that any of his witnesses were unavailable for trial and there is no evidence that Sartain "is unable to elicit specific testimony or produce specific items of evidence." Id. at 22. Additionally, the court found: "There is no evidence that because of his incarceration [Sartain]

has been unable to contact any of his witnesses or that his counsel has been hampered in his ability to gather evidence." Id.

Regarding Sartain's claim that his defense had been impaired because of the difficulties of meeting with his counsel while in the prison, the court stated: "If the nature of that contact and the circumstances surrounding that contact are as true as [Sartain] described them at the hearing . . . , then that contact would have existed whether the trial was held in September or November 2008, or March 2009." Id. at 22-23.

In balancing the four speedy trial factors, the court found that the first two factors weighed in favor of Sartain (Id. at 23), and the third factor, for the following reasons, weighed heavily in favor of the State:

> [T]he Defendant's responses to the delay, indicates that the Defendant wanted three days for the trial so that he could have sufficient time to present witnesses. November 3, 2008, was available date with the trial continuing into November 5, 2008. Defendant agreed to the three day setting in March. Defendant's agreement to the March trial date and waiting until January 2009 to object to that date indicates that Defendant did not sincerely want a trial date before the March 17, 2009, trial date.

Id. at 23-24.

The court weighed the fourth factor, prejudice, in the State's favor, stating:

> Although [Sartain] has experienced anxiety and concern and has expressed his concerns about conditions at the Montana State Prison, [Sartain] was a parolee at the time of his arrest and has spent several years at the prison in the past. The most important interest that the speedy trial right arguably protects, [Sartain's] ability to

> present an effective defense, is not impaired in this case. [Sartain's] consent to the three-day trial in March undermines his argument that the delay has prejudiced his defense.

Id. at 24. After balancing all four factors, the district court concluded Sartain was not denied his right to a speedy trial. Id.

B. Standard of Review

This Court reviews factual findings underlying a district court's speedy trial ruling to determine whether they are clearly erroneous. State v. Ariegwe, 2007 MT 204, ¶ 119, 338 Mont. 442, 167 P.3d 815. A district court's findings of fact are clearly erroneous if they are not supported by substantial credible evidence, if the court has misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite and firm conviction that a mistake was made. "[W]hether the defendant has been denied a speedy trial--i.e., whether the factual circumstances, when evaluated pursuant to the four-factor balancing test, amount to a speedy trial violation--is a question of constitutional law." Id. This Court reviews de novo a district court's legal conclusions to determine whether it correctly interpreted and applied the law. Id.

C. The Four Speedy Trial Factors

When considering a speedy trial claim, the court balances the following four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the accused's responses to the delay; and (4) prejudice to the accused. Ariegwe, ¶¶ 106-12.

1. The Length of the Delay

The speedy trial clock started upon Sartain's March 25, 2008 arrest. Ariegwe, ¶ 42. Sartain's trial began on March 17, 2009. The interval between Sartain's arrest and his trial was 357 days. The 200-day trigger date to conduct further speedy trial analysis was met here. Id, ¶ 41. The delay here stretched beyond the 200-day trigger date by 157 days.

2. Reasons for the Delay

The district court carefully analyzed the delay under three specific periods of delay. (D.C. Doc. 52 at 13-15.) The district court found the State responsible for 332 days of delay and Sartain responsible for 25 days of delay. Of the days of delay attributable to the State, 229 days were institutional delay and 103 days were due to the State's lack of diligence. The district court weighed this factor in favor of Sartain.

On appeal, Sartain does not challenge the district court's findings regarding the attribution of the delay or the reasons for the delay. (Appellant's Br. at 17.) Aside from the slight error regarding the total amount of institutional delay, the State agrees the district court properly attributed the delay and correctly set forth the reasons for the delay. As the district court correctly recognized (D.C. Doc. 52 at 15), the institutional delay here should weigh less heavily against the State in the speedy trial analysis than delay caused by a lack of diligence or bad faith because it

is not delay the State actively pursued or encouraged. State v. Rose, 2009 MT 4, ¶ 57, 348 Mont. 291, 202 P.3d 749.

The district court also found the 103 days of delay between Sartain's March 25, 2008 arrest and his July 7, 2008 initial district court appearance were caused by the State's negligence or lack of diligence. This delay was caused in part by the fact that Sartain was placed in the custody of his parole officer after his release on bail from the Gallatin County Detention Center. As the district court correctly found, 'there was no evidence to suggest that this delay was done in bad-faith by the State to gain any tactical advantage or to avoid trial on the part of the State." (D.C. Doc. 52 at 14.) As far as weight to assign to the 103 days of delay, the State's lack of diligence "occupies a middle ground on the culpability scale." Ariegwe, ¶ 108.

3. The Accused's Response to the Delay

The evaluation of Sartain's response to the delay is based on the surrounding circumstances. Ariegwe, ¶ 85; Rose, ¶ 60. Those circumstances include things such as timeliness, persistence and sincerity of any objections to the delay, reasons for the acquiescence in the delay, whether the accused had counsel, and his pretrial conduct (as that conduct bears on the speedy trial). Rose, ¶ 60. Conduct expressing a desire to be brought to trial promptly weighs in Sartain's favor, whereas conduct demonstrating a desire to avoid trial weights against him in the

overall balancing. Rose, ¶ 60, citing Ariegwe, ¶ 85. Additionally, "Factor Three serves an important role in the balancing test by providing insight into whether the accused actually wanted a speedy trial and what weights the court should assign to the other three factors in the analysis." Ariegwe, ¶ 79.

The discussion of the trial dates at the omnibus hearing shows Sartain did not really want a speedy trial, even though the district court tried to manipulate its trial calendar to provide him with one. The court offered Sartain a September 2008 trial; his counsel was not available all of September. The court offered Sartain a trial starting on November 3, 2008, and then resuming on November 5, 2008, because of the November 4 holiday. Moore initially agreed to the November trial dates, but then balked at the idea because he was worried about not being able to present all of the witnesses that Sartain wished to present. Moore stated Sartain would not be happy if he did not call all of those witnesses. The district court then informed Moore that three trial days were available in March 2009, and Moore requested the March three-day trial setting.

As the district court correctly found, Sartain wanted three days for trial and he never objected to trial being scheduled in March. Additionally, the district court correctly found Sartain acquiesced in the March trial setting, and he did not insist on having a trial earlier than March 17, 2009.

Sartain personally became aware of the March 17, 2009 trial date, in September 2008. (2/24/09 Tr. at 26-27.) However, Sartain waited to raise an objection to his March trial date until he filed his motion to dismiss on January 8, 2009. As the district court correctly recognized, Sartain's four-month delay in filing his motion, demonstrates his lack of persistence and sincerity in objecting to the trial date.

The district court correctly found the State was diligent in bringing Sartain to trial. At the omnibus hearing, the prosecutor stated he was willing to proceed at the earliest trial date, and even asked the district court for a trial earlier than the court's offered November trial dates. In an attempt to obtain an earlier trial date, the prosecutor told the district court the trial would require a minimal voir dire, opening statement, and witness examinations. The prosecutor voiced his concerns about a possible speedy trial problem. It was only after Moore stated he wanted the three-day March trial setting in order to call Sartain's witnesses that the prosecutor assented to the March trial date. In contrast to Sartain, the prosecutor's comments at the omnibus hearing indicate a desire to have the case diligently proceed to trial. The district court correctly weighed factor three heavily in the State's favor.

On appeal, Sartain argues the district court's finding that he acquiesced to the March trial setting was clearly erroneous. He suggests that he did not benefit

from the scheduled March three-day trial because his counsel did not call any witnesses. The fact that Sartain and Moore later made a decision at trial not to call any witnesses does not change the fact that Moore rejected a two-day trial setting in November in favor of a three-day trial setting in March so he could call the witnesses who Sartain wanted to testify. The court's finding that Sartain acquiesced to the March trial date is not clearly erroneous.

Sartain also argues that in the absence of a written waiver or other affirmative evidence, the district court's finding that he acquiesced to the March trial date is clearly erroneous. Sartain's argument is not compelling because there was affirmative evidence in the form of his counsel's statements at the omnibus hearing. Moore specifically asked for a three-day trial setting in order to comply with Sartain's request to call a number of witnesses, and Moore accepted the court's offer of a three-day March trial. In addition, waivers more commonly occur when there is a motion to continue a trial. In this case, the trial date was never postponed.

Sartain suggests that since he was not at the omnibus hearing, Moore could not have spoken on his behalf regarding the March trial date. Thus, this Court should now ignore Moore's comments when assessing his desire to proceed to trial. Sartain's suggestion is unpersuasive. As Sartain's counsel, Moore was Sartain's agent at the omnibus hearing acting on his behalf, and Sartain is bound by

Moore's statements regarding the March trial date. See Vermont v. Brillon, 129 S. Ct. 1283, 1290-91 (2009); Coleman, Thompson, 501 U.S. 722, 753-54 (1991).

Finally, Sartain argues he should not be held responsible because the district court's crowded docket did not provide for a three-day trial prior to March 2009. Sartain's argument is better addressed under factor two, the reasons for the delay. Under factor two, the district court did not hold Sartain responsible for the delay after September 2008, and acknowledged the court's crowded docket was institutional delay and attributable to the State. The court's crowded docket does not change the fact Sartain acquiesced to the March trial date.

4. Prejudice to the Accused

Under the fourth factor, the Court must examine whether the delay prejudiced the accused in light of the interests the speedy trial right protects: (1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that pretrial delay will impair the accused's defense. State v. Billman, 2008 MT 326, ¶ 36, 346 Mont. 118, 194 P.3d 58. There is a presumption the delay prejudices the accused when the speedy trial analysis is triggered, and the presumption increases as the delay increases. Billman, ¶ 36; Ariegwe, ¶ 56.

a. Oppressive pretrial incarceration

A defendant's incarceration on another charge, although not dispositive, is a relevant consideration for a court when it reviews whether the defendant suffered from oppressive pretrial incarceration. Ariegwe, ¶ 92, see also State v. Bowser, 2005 MT 279, ¶ 15, 329 Mont. 218, 123 P.3d 230 ("Incarceration on different charges negates any prejudice from incarceration while awaiting trial.").

Here, on April 1, 2008, Sartain posted bail and was released from the Gallatin County Detention Center. (D.C. Docs. 4, 5.) At the time, Sartain was on parole from an earlier Flathead County burglary conviction. Upon Sartain's return to Butte, his parole officer took him into custody and he was later returned to prison. (2/24/07 Tr. at 6-7.) Sartain violated his parole when he was charged with burglary in this case. (Def.'s Ex. A attached to D.C. Doc. 52.) At the hearing on his motion to dismiss, Sartain admitted that had he not been on parole for burglary, he would not have been incarcerated at the prison while awaiting trial in this case. (2/24/09 Tr. at 28.) Sartain's incarceration for his parole violation undermines his claim he suffered from oppressive pretrial incarceration here.

Additionally, while prison incarceration is something anyone would want to avoid, it is not shocking or overwhelming for someone with a record like Sartain. Sartain has five burglary convictions and previously spent eight years in Montana State Prison. As the district court correctly observed, Sartain's incarceration has

"not been duly oppressive particularly in light of [Sartain's] criminal history and the fact that he previously spent a considerable amount of time in prison." (D.C. Doc. 52. at 20.)

b. The accused's anxiety and conern

"[A] certain amount of anxiety and concern is inherent in being accused of a crime." Ariegwe, ¶ 97. The question is whether the delay in bringing Sartain to trial unduly prolonged the disruption of his life or aggravated the anxiety and concern inherent in being accused of burglary. Id.

Here, the district court acknowledged Sartain suffered some anxiety and concern due to his incarceration and economic hardship because he was unable to work. (D.C. Doc. 52 at 21.) However, the court concluded Sartain's anxiety and concern were not aggravated by the delay in light of his acquiescence in the March trial setting. Id. Sartain contends the district court's conclusion is suspect because he never signed a written waiver of his right to speedy trial, he was absent from the omnibus hearing, and his counsel's "questionable representation" at the hearing. (Appellant's Br. at 27.) Sartain's contention is not compelling. As previously explained, at the omnibus hearing, Moore asked for a three-day trial setting in order to satisfy Sartain's wishes to call a number of witnesses, and Moore accepted the district court's offer of a March 2009 trial setting to comply with Sartain's request. Sartain's absence from the hearing, or the lack of written waiver, does not

change the fact his counsel, acting on his behalf, acquiesced to the March 2009 trial date.

c. Impairment of the defense

As this Court has stated, "[l]imiting the possibility that the pretrial delay will impair the accused's defense arguably is the most important interest that the speedy trial right protects because an accused's inability to present an effective defense undermines the fairness of the system." Billman, ¶ 47, citing Ariegwe, ¶ 98.

Sartain's defense was not impaired. There is no evidence in the record that his witnesses disappeared, evidence was lost, memories of the witnesses faded, or Sartain was unable to raise specific defenses due to the delay. Moreover, Sartain's approval of the three-day trial setting in March 2009 in order to allow him to call all of his witnesses undermines any claim that his defense was impaired.

Sartain argues the strip searches he underwent at the prison before he could meet with Moore impaired his defense because the searches made it difficult to meet with Moore. Sartain's argument is not compelling. The searches might have made it difficult for Sartain to meet with Moore, but they did not prevent him from doing so. Moreover, Sartain has not specifically demonstrated how the prison searches impaired his defense. He has not named one witness who was lost or whose memory faded, one piece of evidence he was unable to discover, or a specific defense he could not assert as a result of the searches that took place at the

prison prior to his sitting down with counsel. Further, he was not in prison on this charge, but rather, was in prison based on the revocation of his parole for his Flathead County burglary conviction.

Sartain claims Moore's comments regarding Sartain's right to testify after the State's case-in-chief demonstrates that his communication with Moore was impeded, and this Court should infer from those comments that they had never discussed whether he would testify. (Appellant's Br. at 26-27.) Sartain's claim is speculative. Although he had the opportunity to do so at his speedy trial hearing, Sartain never claimed that prior to trial Moore had not talked to him about whether he should testify. Moreover, the fact Sartain is not raising ineffective assistance of counsel based on Moore's alleged failure to discuss his right to testify further supports a conclusion Sartain and Moore had such a disussion. Additionally, on appeal, Sartain never states the discussion did not take place. Instead, he merely claims that it is fair to infer that no discussion took place. (Appellant's Br. at 27.) One could just as easily infer from Moore's comment that he had discussed the matter with Sartain and he simply wanted to have another conversation with Sartain in order to review the pros and cons of him testifying. Interestingly, after Sartain and Moore had that discussion, the defense rested and Sartain did not testify. (3/18/09 Tr. at 136-39.)

The district court's finding that "[t]here is no evidence that [Sartain's] ability to present an effective defense has been impaired by the delay" is not clearly erroneous. (D.C. Doc. 52 at 23.)

5. The District Court Correctly Balanced the Four Speedy Trial Factors.

The district court correctly concluded that the length of and reasons for the delay weighed in Sartain's favor. The district court correctly weighed the third factor, Sartain's responses to the delay, heavily in favor of the State. Finally, the district court correctly weighed the fourth factor in favor of the State. After balancing the four factors, the district court correctly concluded that Sartain's right to speedy trial was not violated.

II. LEGAL STANDARDS FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

In evaluating an ineffective assistance of counsel claim, this Court utilizes the two-part test set forth in Strickland v. Washington, 466 U.S. 668 (1984). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687; Whitlow v. State, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. Specifically, the "defendant must show that counsel's representation fell below an objective standard of reasonableness." Whitlow, ¶ 14, quoting Strickland, 466 U.S. at 687-88.

In order to eliminate the distorting effects of hindsight, judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689; Whitlow, ¶ 15. Courts should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689; Whitlow, ¶ 15.

Second, the defendant must show that counsel's deficient performance prejudiced the defense. Strickland, 466 U.S. at 687; Whitlow, ¶ 10. Under the prejudice prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Strickland, 466 U.S. at 694; State v. Hagan, 2002 MT 190, ¶ 18, 311 Mont. 117, 53 P.3d 885.

Before addressing an ineffective assistance claim on direct appeal, this Court must first determine whether the record on direct appeal is sufficient to determine whether counsel was ineffective. State v. Robinson, 2009 MT 170, ¶ 29, 350 Mont. 493, 208 P.3d 851. As this Court has stated: "Claims involving omissions of trial counsel are often ill-suited for direct appeal." Id. If the record on direct appeal "explains 'why' counsel did not do something, [this Court] will then address the issue on appeal." Id. On the other hand, "[i]f the claim is based on matters outside the record on appeal, [this Court] will not address the claim and allow the defendant to file a postconviction proceeding where a record can be developed as to 'why' counsel

omitted some action, thus allowing the court to determine whether counsel's performance was ineffective or merely a tactical decision." Id.

III. SARTAIN'S INEFFECTIVE ASSISTANCE CLAIMS SHOULD BE REVIEWED IN A POSTCONVICTION PROCEEDING.

Sartain alleges Moore provided ineffective assistance because he failed to: (1) challenge the show-up identifications; (2) challenge the legality of his arrest; (3) move for suppression of the statements Sartain gave after his arrest; and (4) object to the prosecutor's alleged improper remarks, questions and closing argument. Sartain's claims are not appropriate for direct appeal because the record does not explain why Moore did not challenge the show-up identifications and legality of the arrest, move for the suppression of Sartain's statements, or object to the prosecutor's remarks, questions and argument. Robinson, ¶ 29. This Court cannot address Sartain's claims because the silent direct appeal record does not reveal whether Moore's inactions were reasonable tactical decisions or mistakes. State v. Vukasin, 2003 MT 230, ¶ 43, 317 Mont. 204, 75 P.3d 1284. The silent record here cannot rebut the strong presumption that Moore's conduct falls within the wide range of reasonable professional assistance. State v. Rovin, 200 MT 16, ¶ 34, 349 Mont. 57, 201 P.3d 780.

A postconviction proceeding is the appropriate forum for Sartain's claims. Such a proceeding will provide Moore the opportunity to explain his actions or

inactions and the necessary record to evaluate whether his strategy and tactics fall within the range of reasonable professional conduct.

IV. ASSUMING THIS COURT CHOOSES TO ADDRESS THE CLAIMS, SARTAIN HAS NOT DEMONSTRATED MOORE PROVIDED INEFFECTIVE ASSISTANCE.

A. The Show-up Identification

After his arrest, the police brought Sartain back to Hop's apartment to see if Hop could identify Sartain as the intruder. Hop could not positively identify Sartain. (3/17/09 Tr. at 111-12). The police also gave Helsper the opportunity to identify Sartain, and although Helsper stated Sartain seemed to match the description of the man she saw running down the street, she too was not able to positively identify Sartain because she never saw the face of the man running down the street. (3/17/09 Tr. at 168.)

Sartain argues that the police's use of the show-up identifications violated his right to due process, and Moore provided ineffective assistance by not challenging the identifications prior to trial. Sartain's claim is unpersuasive. Moore had no reason to challenge the show-up identifications because neither Sartain nor Helsper could positively identify Sartain. The inability of Hop and Helsper to identify Sartain at the scene helped rather than hurt Sartain's case.

During cross-examination, Moore took advantage of Hop's inability to positively identify Sartain at the scene and used it to call into question not only Hop's in-court identification of Sartain, but Hop's credibility. At trial, Hop identified Sartain as the man he saw in his apartment and yard. (31/7/09 Tr. at 89, 113-14.) On cross-examination, after discussing the places where the various attorneys were sitting in the court room, Hop admitted it is not very difficult to pick out the defendant in court. (3/17/05 Tr. at 115.) Hop also admitted his testimony in court was that he was absolutely a 100 percent positive Sartain was the man in house, even though he could not positively identify Sartain at the scene. (3/17/09 Tr. at 134-35.)

Moore also highlighted for the jury on his cross-examination of Helsper the fact she could not positively identify Sartain during the show-up identification at the scene. (3/17/08 Tr. at 168.) In closing argument, Moore emphasized neither Hop nor Helsper could positively identify Sartain at the scene. (3/18/00 Tr. at 184-85, 187.) Moore strategically used the show-up identifications to Sartain's advantage. Moore's performance was not deficient under the Strickland test.

As part of his claim, Sartain argues the record "demonstrates that Sartain could have persuasively attacked the reliability of the identification pre-trial and should have attacked the admissibility of the in-court identification." (Appellant's Br. at 34.) The fact Sartain supports his claim in part by citing to Moore's

cross-examination of Hop (see 3/17/09 Tr. at 115, 118, 120, 124-25), refutes the very argument he attempts to make.

In his closing argument, Moore told the jury the State's four eyewitnesses gave inconsistent descriptions. (3/18/09 Tr. at 187.) Sartain claims Moore compounded his alleged error regarding the identifications of Sartain by incorrectly telling the jury there were four eyewitnesses. Sartain maintains there was only one true eyewitness to the crime. Moore did not misinform the jury. Sartain's definition of an eyewitness is too narrow. One can be an eyewitness to an event in a criminal case that does not involve the actual moment the crime is committed. Here, Hop was an eyewitness to seeing Sartain in his apartment, Helsper was to an eyewitness to seeing a man run away from the apartment and down the street, Inabnit was eyewitness to seeing a man cut through his yard, and Schutz was an eyewitness to seeing Sartain jump over his fence and run down the street. Sartain has failed to show Moore provided ineffective assistance under the Strickland test.

B. Challenging Sartain's Warrantless Arrest and Suppresson of Sartain's Statements After His Arrest

Officer Klumb had probable cause to arrest Sartain. Montana Code Annotated § 46-6-311(1) provides that a peace officer may arrest a person without a warrant "if the officer has probable cause to believe that the person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest." This Court has stated that "[p]robable cause to arrest is

established if the facts and circumstances within an officer's personal knowledge, or related to the officer by a reliable source, are sufficient to warrant a reasonable person to believe that someone is committing or has committed an offense." State v. Williamson, 1998 MT 199, ¶ 12, 290 Mont. 321, 965 P.2d 231.

The facts and circumstances here would lead a reasonable person to believe Sartain had committed the burglary of Hop's apartment. The facts and circumstances pointing to Sartain as the burglar began when Klumb received a call from the dispatcher at 1:32 p.m., that an intruder had entered an Aspen Street apartment and had fled. It took Klumb five or six minutes to get to the scene. (3/17/09 Tr. at 186, 227-28.) Shortly after arriving at the scene, Klumb saw a man matching the description of the suspect jogging down the sidewalk. (3/17/09 Tr. at 187-88, 214-15.) The man, later identified as Sartain, was approximately 1/2 block west and 1/2 block south of Hop's apartment. (3/17/09 Tr. at 194, 214; State's Ex. 1.)

At the same time he saw Sartain, Klumb saw Schutz standing on the sidewalk in front of his house. Klumb pulled his patrol car over and asked Schutz what he was looking at down the sidewalk. Schutz said the man running down the sidewalk had just jumped the fence in his yard, and had cut through his neighbor's lawn. (3/17/09 Tr. at 188-89; 3/18/09 Tr. at 127.) Sartain's suspicious behavior of hopping a fence and running through yards near Hop's apartment is a fact that would further lead a reasonable person to believe Sartain was the intruder and trying to flee.

At 1:47 p.m., Klumb stopped Sartain, handcuffed him, and patted him down for weapons. When Klumb searched Sartain for weapons, he noticed Sartain was breathing hard, as if he had been running. He could feel Sartain's heart beating. (3/17/09 Tr. at 192-93.) Sartain's racing heart further pointed to him as the intruder who ran from Hop's apartment.

Klumb had probable cause to arrest Sartain. Moore's decision not to challenge the legality of the arrest was not deficient performance under Strickland. Even if this Court concludes Sartain's warrantless arrest was illegal, and Sartain's statements to the police should have been suppressed, had Moore challenged the arrest and moved to suppress the statements, Sartain has not demonstrated prejudice under Strickland. In order to establish prejudice, Sartain must show a reasonable probability exists that the outcome of the proceeding would have been different had Sartain's statements been suppressed and not introduced at trial. Sartain has failed to do so. He, in essence, is asking this Court to presume prejudice. This Court should refuse to do so.

C. Objecting to Prosecutor's Questions, Remarks and Closing Argument

Sartain argues Moore provided ineffective assistance because he failed to object to the following: (1) the prosecutor asking Klumb about the truthfulness of his testimony; (2) the prosecutor referring to witnesses as eyewitnesses; and (3) the prosecutor's closing argument.

Counsel's use of an objection lies within his or her discretion. Clausell v. State, 2005 MT 33, ¶ 20, 326 Mont. 63, 106 P.3d 1175. It is not unreasonable that counsel, as a trial tactic, would refrain from objecting at certain times in a case; any number of reasons not apparent on the direct appeal record may explain why an attorney chooses not to object. State v. Olsen, 2004 MT 158, ¶ 17, 322 Mont. 1, 92 P.3d 1204.

This Court should not address Sartain's claims regarding Moore's failure to object because the silent record here does not reveal whether Moore's inaction was a reasonable tactical decision or a mistake. Vukasin, ¶ 43; Olsen, ¶ 17. Sartain's claims are more appropriate for postconviction relief. Olsen, ¶ 17.

Moreover, since the prosecutor's references to eyewitnesses and his questions to the officer regarding the truthfulness of his testimony were not objectionable, Moore's failure to object does not constitute ineffective assistance. Kills On Top v. State, 273 Mont. 32, 57, 901 P.2d 1368, 1384 (1995) (failure to object does not constitute ineffective assistance when the objection lacks merit and would have been properly overruled). The prosecutor correctly referred to the witnesses as "eye witnesses." Simply because some of the witnesses did not actually see Sartain in Hop's apartment, does not mean they were not eyewitnesses to some part of the case.

Likewise, the prosecutor did nothing improper when he asked Officer Klumb, "Is there any doubt what you've testified today" and "That it's the truth." (3/17/09 Tr. at 226.) Sartain has failed to cite any authority for his claim that the

prosecutor's questions were objectionable as required by Mont. R. Evid. 12(1)(f). Additionally, the prosecutor's questions to Klumb were in response to Moore's suggestion during cross-examination that Klumb's testimony concerning a comment Sartain made to Klumb was unbelievable because the comment was not in Klumb's initial report. (3/17/09 Tr. at 220-23.)

In his argument, Sartain forgets he must demonstrate prejudice under the Strickland test to be granted relief. Sartain's prejudice argument consists essentially of a recitation of the Strickland prejudice standard. He fails to offer any evidence to support a conclusion that a reasonable probability exists that but for the prosecutor's comments and questions, the outcome of the proceeding would have been different.

Similarly, Sartain's ineffective assistance claim regarding the prosecutor's closing argument is not compelling because the prosecutor's statement was not objectionable. Sartain finds fault with the prosecutor for commenting that a defense attorney's job is to the muddy the waters, create confusion and that "he did a good job of that." The prosecutor's comments about "muddying the waters" and "confusion" were no different than if he had said defense counsel's job is to raise reasonable doubt or that the defense counsel is raising a "red herring." Moreover, instead of objecting to the prosecutor's statement, Moore took advantage of it in his closing by responding: "If my job is to muddy the waters, then it's the State's job to make my client look bad, to make him look guilty." (3/18/09 Tr. at 187.)

Even if the prosecutor's closing remarks were improper and objectionable, Sartain must demonstrate, based on the record, that the prosecutor's argument prejudiced his right to a fair trial. State v. Gladue, 1999 MT 1, ¶ 27, 293 Mont. 1, 972 P.2d 827. Sartain has failed to demonstrate any prejudice based on the record, and this Court should not presume Sartain suffered prejudice from the prosecutor's alleged improper argument. Id.

CONCLUSION

This Court should affirm the district court's order denying Sartain's speedy trial claim and Sartain's conviction.

Respectfully submitted this ____ day of June, 2010.

STEVE BULLOCK
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: _____
MICHEAL S. WELLENSTEIN
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

Ms. Nancy G. Schwartz
NG Schwartz Law, PLLC
U.S. Bank Building
303 North Broadway, Ste. 600
Billings, MT 59101

Mr. Scott Lanzon
Deputy Gallatin County Attorney
1709 W. College
Bozeman, MT 59715

DATED:_____ _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 9,970 words, excluding certificate of service and certificate of compliance.

_____
MICHEAL S. WELLENSTEIN